

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of ANITA M. MAYNARD and DEPARTMENT OF VETERANS AFFAIRS,  
VETERANS ADMINISTRATION MEDICAL CENTER, Leavenworth, KS

*Docket No. 03-1321; Submitted on the Record;  
Issued September 4, 2003*

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DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether appellant has established that she sustained an injury in the performance of duty.

On January 17, 2001 appellant, then a 45-year-old registered nurse, filed an occupational disease claim alleging that on December 7, 1999 she first realized that her allergic reaction to latex was caused by factors of her federal employment. Appellant stated that when she came to work in December 1999 she had to leave due to the swelling of her eyes, itchy body, and burning of her face and chest, which turned red. She also stated that the last time her throat felt thick and the area around her mouth was numb and tingling. This reaction started about one-half hour after she started work and progressed until she could not focus on her job. She had to leave one to one and one-half hours after arriving to work. Appellant's narrative statement, statements from her coworkers regarding her alleged injury, medical evidence indicating that she had a latex allergy and literature concerning allergic reactions to latex accompanied her claim.

By letter dated February 5, 2001, the Office of Workers' Compensation Programs requested that the employing establishment submit additional information regarding appellant's exposure to the alleged factor and a copy of appellant's job description. In a March 1, 2001 response letter, Tina Powers, an employing establishment personnel management specialist, stated that the employing establishment was aware of concerns about latex and steps had been taken to reduce latex use. Ms. Powers noted that appellant had been transferred to another unit to reduce her latex exposure. She indicated that appellant underwent vein-stripping surgery in September and November 2000, which could have potentially caused her to be exposed to latex internally. She noted appellant's statement that up until December 1999 her latex allergy was only topical in nature. Ms. Powers stated that appellant was not exposed to anything that would have caused her latex allergy to become systemic. She further stated that appellant told her and Nelson Dean, Director of Nursing for Primary Care, that her 1999 surgery may have exposed her to latex and caused a systemic allergic reaction.

Upon review of the medical evidence of record indicating that appellant had a latex allergy, the Office referred appellant to Dr. Chajuta Guss, a Board-certified allergist and immunologist, for a second opinion medical examination by letter dated April 6, 2001. Dr. Guss submitted a June 2, 2001 report finding that there was no objective evidence establishing that appellant had a latex allergy.

In an October 31, 2001 decision, the Office found the medical evidence of record insufficient to establish that appellant sustained an injury caused by factors of her federal employment based on the opinion of Dr. Guss. Appellant requested reconsideration and submitted literature regarding latex in the workplace and medical evidence including a November 27, 2002 report from Dr. Jeffrey A. Wald, a Board-certified allergist and immunologist, finding that she had a latex allergic reaction which the physician attributed to factors of her employment.

The Office found a conflict in the medical opinion evidence between Dr. Guss and Dr. Wald and referred appellant, together with a statement of accepted facts, medical record and a list of specific questions, to Dr. Michael Lewis Loren, a Board-certified allergist and immunologist, for an impartial medical examination. In a January 28, 2003 report, Dr. Loren opined that appellant did not have an allergy due to exposure to latex at the employing establishment.

By decision dated February 10, 2003, the Office denied appellant.<sup>1</sup>

The Board finds that the weight of the medical evidence establishes that appellant does not have an allergy to latex causally related to her employment.

An employee seeking benefits under the Federal Employees' Compensation Act<sup>2</sup> has the burden of establishing the essential elements of her claim including the fact that the individual is an "employee of the United States" within the meaning of the Act, that the claim was timely filed within the applicable time limitation period of the Act, that an injury was sustained in the performance of duty as alleged and that any disability and/or specific condition for which compensation is claimed are causally related to the employment injury.<sup>3</sup> These are the essential elements of each compensation claim regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.<sup>4</sup>

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual

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<sup>1</sup> On appeal, appellant has submitted new evidence. However, the Board cannot consider evidence that was not before the Office at the time of the final decision; see *Dennis E. Maddy*, 47 ECAB 259 (1995); *James C. Campbell*, 5 ECAB 35 (1952); 20 C.F.R. § 501.2(c)(1). Appellant may resubmit this evidence and any legal contentions to the Office with a request for reconsideration pursuant to 5 U.S.C. § 8128(a).

<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

<sup>4</sup> See *Delores C. Ellyett*, 41 ECAB 992, 994 (1990); *Ruthie M. Evans*, 41 ECAB 416, 423-25 (1990).

statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The medical evidence required to establish a causal relationship is rationalized medical opinion evidence. Rationalized medical opinion evidence is medical evidence which includes a physician's rationalized opinion on the issue of whether there is a causal relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.<sup>5</sup>

In this case, the Office properly found that a conflict existed in the medical opinion as to whether appellant had a latex allergy and whether it was causally related to factors of her employment. The Board notes that Dr. Guss, an Office referral physician, opined that appellant did not have a latex allergy. Dr. Wald, appellant's treating physician, however, opined that appellant had a latex allergic reaction that was related to factors of her employment. In light of this conflict, appellant underwent an impartial medical examination.

Section 8123 of the Act provides that, if there is a disagreement between the physician making the examination for the Office and the employee's physician, the Office shall appoint a third physician to resolve the conflict.<sup>6</sup> When a case is referred to an impartial medical specialist for the purpose of resolving a conflict of medical evidence, the opinion of such specialist, if sufficiently well rationalized and based on a proper medical background, must be given special weight.<sup>7</sup>

The impartial medical examiner in this case was Dr. Loren. In a January 28, 2003 report, Dr. Loren provided a history of appellant's exposure and reaction to latex in her personal life and at the employing establishment. He noted appellant's symptoms of wheezing and shortness of breath. Dr. Loren provided his findings on physical examination and opined that appellant had a history consistent with sensitivity to latex, but her allergic reaction had been shown to be negative on a number of occasions either through skin testing or blood studies. He noted a study finding that the use of powdered latex gloves, which appellant stated that she used in her work area, enabled patients to continue working in their trained profession and prevented measurable airborne latex exposure. The study also cautioned that patients should avoid direct latex contact. Dr. Loren opined that it was likely that, if latex particles were measured in appellant's work area, the levels would be undetectable. He noted the possibility of other factors that could have caused appellant's symptoms of itching and facial swelling such as, sensitivity to antibiotics like penicillin, which had been linked to mild anaphylaxis. Dr. Loren opined that appellant had mild

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<sup>5</sup> *Victor J. Woodhams*, 41 ECAB 345, 351-52 (1989).

<sup>6</sup> 5 U.S.C. § 8123; *see Robert D. Reynolds*, 49 ECAB 561 (1998).

<sup>7</sup> *See Sherry Hunt*, 49 ECAB 467 (1998); *Wiley Richey*, 49 ECAB 166 (1997).

idiopathic anaphylaxis. In response to the Office's questions, Dr. Loren stated that the validity and objective results of latex tests could not be confirmed. He further stated that appellant did not have an allergy resulting from her exposure to latex in the work environment. He noted that most latex in the form of rubber products such as, wheels on wheelchairs was not aerosolizable and did not have any link to illness. He opined that appellant's allergy could have developed over her 15-year exposure to latex and that factors of her employment did not aggravate her latex allergy. Dr. Loren concluded that appellant should avoid the use of any direct latex products, but if she worked with other employees using nonlatex gloves, she would likely be able to perform her full duties as a staff nurse. He further concluded by noting appellant's medical treatment plan.

Dr. Loren offered medical reasoning to support his conclusion and the medical record, together with the statement of accepted facts, provided him a proper factual foundation to evaluate appellant. He specifically opined that appellant's latex allergy was not causally related to her employment as a staff nurse. The Board finds that his opinion is entitled to special weight and resolved the outstanding conflict between Dr. Guss and Dr. Wald.

The February 10, 2003 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
September 4, 2003

David S. Gerson  
Alternate Member

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member